



Supreme Court of the United States

OCTOBER TERM, 1918

649

ALVAH CROCKER, et al, *Trustees, Petitioners,*

vs.

JOHN F. MALLEY, *Collector, Respondent.*

John F. MALLEY, *Collector, Respondent,*

vs.

ALVAH CROCKER, et al, *Trustees, Petitioners.*

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

AND APPENDIX

FELIX RACKEMANN,
For Petitioners.

BOSTON:
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Supreme Court of the United States

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No.1323

ALVAH CROCKER, et al, *Trustees, Petitioners,*

vs.

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No. 1324

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ALVAH CROCKER, et al, *Trustees, Petitioners.*

PETITION FOR WRIT OF CERTIORARI to the
UNITED STATES CIRCUIT COURT of APPEALS for the
FIRST CIRCUIT.

and appendix.

To the Supreme Court of the United States:

Your Petitioners, Alvah Crocker *et al*, Trustees, respectfully pray for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit in the above entitled causes.

The Record and General Question.

These are cross Writs of Error arising from a suit of Alvah Crocker *et al* Trustees, of the "Wachusett Realty Trust" so called, against John F. Malley, Collector of Internal Revenue for the District of Massachusetts, to recover back \$10,875.40 of Federal income taxes assessed under Act of October 3, 1913, (38 Stats. 166-172), to the plaintiffs as an "association" (or joint stock association) under Section II, Sub-division G (*a*).

Plaintiffs contended that they were strict trustees, not an association, and were taxable as fiduciaries under Sub-division D; the material difference being that assessed as an association stock dividends are included, while assessed as fiduciaries dividends are excluded. The case was tried without a jury on agreed facts, by the Hon. George H. Bingham, Circuit Judge, who determined that the plaintiffs were entitled to recover the total claim, viz: \$10,875.40, less the sum of \$1321.33, for which sum he found the plaintiffs might have been assessed as fiduciaries. Judgment was entered for the plaintiffs in the sum of \$9,554.07, with interest from October 11, 1916.

Both parties sued out Writs of Error from this judgment to the United States Circuit Court of Appeals for the First Circuit; the Collector for the review of the entire judgment, the plaintiffs for the review of the disallowance of the \$1321.33.

The Circuit Court of Appeals (Hon. Frederic Dodge, Hon. Edgar Aldrich, and Hon. Charles F. Johnson) ordered that the judgment of the District Court be reversed and the case remanded to that Court with directions to enter judgment for the Collector. (See Opinion Record page 53.)

A Petition for Rehearing was denied by said Court on the 10th day of June, 1918. (Record page 77.)

The mandates in these cases have been recalled. (Record page 87.)

The question we present in this Petition is no mere private litigation but one involving the proper construction of important words in the Federal Income Tax law.

No conflict of testimony, no dispute over facts, is presented. The Revenue Department adopted, on its own motion, and followed for over two years, the construction we insist on, and then reversed itself. The District Court held with us. The Court of Appeals reversed the decision of the District Court, and necessarily the construction and practice adopted by the Revenue Department for over two years. The question is of wide application, involves very large amounts in every part of the country, and, is of public importance.

The Agreed Facts.

The agreed facts (record page 15) show (so far as material here) substantially the following summarized situation:

Many years ago Crocker, Burbank & Co. did business at Fitchburg, Mass., as a partnership, manufacturing paper. Later they incorporated in Maine, and so continued for many years. In 1912 they reincorporated in Massachusetts, the stockholders being eight members of the families.

On reincorporation the Massachusetts Company took title to most of the property and a long term lease of the rest.

It was desired that the Maine Company might be liquidated and dissolved. Pending development of further plans, title to the leased premises and the shares of the new Company were taken by the petitioners, as trustees, under a Declaration of Trust which they then made, and which appears (record page 10) called "The Wachusett Realty Trust."

A full copy of this Declaration is in the Appendix A at the end hereof. (post p. 14.)

This arrangement was assented to by each shareholder of the Maine corporation *merely* by the surrender of the old Maine Company shares, and the acceptance of trust receipts issued by these trustees.

The new Massachusetts corporation thus acquired seven of the mills in fee, and lease of the eighth mill and outlying properties.

The shareholders of the Maine corporation took the trust receipts of the trustees in exchange for their shares of the Maine Company, and the Maine Company was dissolved.

The trustees have done no business. They have received from time to time rental from the Massachusetts corporation, and the dividends declared on the stock of that corporation, and have disbursed such income, less charges and expenses, to their several beneficiaries. There is no joint stock, no "capital" as such. There is no liability of the *cestui que trusts* for anything. The trust is stated to be for the purpose of conversion into money and liquidation.

The Petitioners and Their Trust.

The Petitioners are trustees under a Declaration of Trust made by them dated March 29, 1912, a copy of which appears as Appendix A. (post page 14) (Record page 10.)

That Declaration created a strict trust at Common Law with the eight beneficiaries, strict *cestui que trusts*. There is no question about this.

Hale, District Judge, so held in *Crocker v. Crocker* (not reported.) (Record page 42 and page 62.)

Bingham J so held at the trial (Record page 42) and the Circuit Court of Appeals agrees (Record page 62.)

A full copy of the memorandum decision of Hale J. is added hereto as Appendix D. (post p. 24)

In *Crocker v. Crocker* this very Declaration of Trust, was before the District Court in 1914 on a Bill in Equity, brought on the authority of *Eliot v. Freeman*, 220 U. S. 178, for an

injunction restraining the trustees from making return under the Income Tax Law of 1913 as an association.*

Income taxes were assessed to these trustees for the years 1913 and 1914 as *fiduciaries*, and duly paid by them.

Thereafter the Collector demanded additional taxes for these years, and new taxes for 1915, on the theory that the plaintiffs were an "association"; the practical difference being that, as *fiduciaries*, they were not taxable in respect of their stock dividends, while if an "association" or *quasi-corporation* they were liable for such dividends.

This suit is to recover back such additional taxes.

At the trial the Collector claimed that the plaintiffs would have been assessable and liable in 1915 as *fiduciaries* for a tax of \$1321.33, and that, therefore, the plaintiffs could not recover their full claim by that amount in any event.

To this the plaintiffs objected that this was not a suit against the Government, and that the Collector had no right, in this suit, to set off amounts which might be due on other accounts from the plaintiffs to the *United States Government*, as if the United States were the real defendant, and that such set off in this suit would be no protection to the plaintiffs against a later claim by the Government.

The Decision of the Court of Appeals.

The Court of Appeals decides that the Act taxes two classes of income only; viz—(a) *individual* income and (b) *group* income (Record page 78). It then decides that the income of the *cestui que trusts* is not *individual* income, "arising or accruing to them" as individuals, because the trustees, *though, in fact, they distributed the entire net income* (Record page 18 top) had the right to make reserves therefrom. (Record page 60) and

*NOTE—It was hoped that (following the precedent of *Eliot v. Freeman*) that case of *Crocker v. Crocker* might have gone to the Supreme Court of the United States, so that the question could have been there finally decided, but the Department of Justice did not favor such course at that time, and the suit went no further.

that the income was not "immediately available to the beneficiaries." (Record pages 59-60.)

It then decides that unless the income be considered *group income* it is not taxable under any "*express provisions*" of the Act; and therefore, despite its conclusion that the trust in question is a "strict trust," and the beneficiaries strict "*cestui que trusts*" (Record page 62) it decides, on a forced and unnatural construction of the words "Joint Stock Association," that either the trustees and their *cestui que trusts* or the *cestui que trusts* separately, or the "trustees collectively" (it is very doubtful which) formed such an "Association" and were taxable as such (see Opinion Record top page 63, and near bottom same page, and page 64, 7th line.)

The intent of the Court of Appeals is obscure in respect of the persons held to constitute the "Association."

First the Court says the "Association" is of the *trustees* and the *cestui que trusts*. (Record foot page 62 and top page 63). Then it says the *cestui que trusts* alone were associated (Record foot page 63), and finally that the income was received by the *trustees collectively* (Record page 64.) Would the decision have been different if there had been one trustee instead of five?

The Errors of the Decision.

We may assume, for the argument, with the Court of Appeals, that the Act taxes, generally, two classes only of income, viz,—*individual* income and income of corporations, joint stock companies etc., generally referred to by the Court as "*group*" income. It is not true that income of a strict trust actually paid to a beneficiary is not his *individual* income because his trustees had some discretion as to distributing or holding or applying it. All the net income was, *in fact*, distributed by the trustees. (Record page 18.)

It is here that the Court of Appeals made its real error and in consequence, in order to bring the assessment under some

“express provision” of the Act, obliged itself to resort to its forced construction of the words “Joint Stock Association.”

It is error to say in the same breath that certain individuals are “*cestui que trusts*” under a strict common law trust, (See Opinion Record page 62) but that at the same time they, either by themselves or together with the trustees, form a “joint stock association” under the Act of 1913.

Such a decision throws all legal classification into doubt and tends to great confusion of legal principles.

It is perfectly clear that, whatever classes of income be taxable, there are *three* classes upon whom the taxes shall be levied and assessed, viz., — individuals, fiduciaries, and corporations or quasi corporations.

The material parts of the Act are, for convenience, stated in Appendix B,—(post p. 19).

The income of an individual *cestui que trust* is collected by his trustee who has to make return thereof and pay the tax thereon.

The act requires such returns and payments from fiduciaries as to all income collected by them whether absolutely and immediately payable by them to some named beneficiary or not.

There is no resulting confusion whatever if *individual income* be held (as the Treasury Department rules) to include, not only all income actually paid over by a trustee to his *cestui que trust*, but all income “arising or accruing” to individuals “whether distributed or not.”

I.

The Federal Income Tax Act of 1913, Sec. II G (a) applies to "every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships."

The Circuit Court of Appeals holds that under this section five trustees of a strict common law trust are assessable as a "joint stock association."

We submit that this is error.

The Court of Appeals erred, *first*, in its determination as to what is *individual income*, and *second*, in its adoption of so novel and unprecedented a meaning of the words "Joint Stock Association."

II.

In the administration of the Federal system of income taxes and war revenue taxes, it is important that the words "joint stock company or association," as used in the Act of October 3, 1913, and repeated in the subsequent acts (Act of Sept. 8, 1916 and Act of Oct. 3, 1917), should be defined.

There is need of a judicial construction of the scope of the words "joint stock company or association" as used in the Act of Oct. 3, 1913 and subsequent acts, as compared with the same words in the Corporation Tax Law of 1909, which was before this Court in *Eliot v. Freeman*, 220 U. S. 178.

In *Eliot v. Freeman*, this Court construed the words "organized under the laws of the United States or of any State" etc. as limiting the operation of the Corporation Tax Law to corporations and to joint-stock companies or associations organized under statute.

It is submitted that the words "joint-stock" in the Act of 1913 govern the word "association" just as much as the word "company", and that the intent of Sub-section G (a) was to group only corporate and *quasi-corporate* organizations.

Would this statute have called for a different construction if the clause had read "joint-stock association or company," instead of "joint-stock company or association"?

"Joint-stock associations" have been known to the common law since the time of Queen Ann, and the term "joint-stock association" is, in the history of the development, more frequent than the term "joint-stock company." The former is the expression used by this Court in *Eliot v. Freeman*, 220 U. S. at page 186.

For the English construction of the word "association" see the leading case of *Smith v. Anderson*, 50 L. J. Ch. 522. See also the later case of *in re Thomas ex parte Poppleton*, 54 L. J. QB. 336.

The decision of the Circuit Court of Appeals is contrary to these English cases.

III.

The opinion of the Circuit Court of Appeals lays down in unqualified terms the proposition, (clearly unsound, as we submit), that the income received by the Trustees of the Wachusett Realty Trust, could not possibly be deemed income accruing, through the hands of the Trustees, to the beneficiaries

individually, in spite of the fact that it was actually distributed among them; the only reason given being that under the provisions of the Declaration of Trust, the Trustees had the power in their discretion, to withhold income from distribution and apply it to the development and improvement of the trust property; it could not, therefore, the Court holds, be income taxable to the Trustees, as fiduciaries, under Section II, D of the Income Tax Act. (Record page 61-62.)

This conclusion, and the reason given therefor, the Court appears to regard as beyond question, and it is on this assumption that the Court seeks some other provision of the statute, under which the income might be taxed. In this way the Court was led to adopt a strained and unnatural meaning of the word "association". For the Court says, in substance, "It is impossible to consider this income as individual income of the beneficiaries, to be taxed to their trustees, through whom they received it, and unless we can find a way to bring it under the clause taxing the income of corporations and similar 'group income', it will escape taxation under any express provision of the Statute."

This proposition is contrary to the practise of the Treasury Department.

It is not sound as a construction of the statute, and if the error is not corrected, it will cause great doubt and confusion in the administration of the law, under the later statutes as well as under the Act of 1913.

IV.

It is submitted (notwithstanding the Rescript of the Court of Appeals, Record page 77) that the opinion, holding that trust income cannot be taxed as income of the *cestui que trust* unless it be "immediately available" as such to him,—and if

not so available to a *cestui que trust* still cannot be taxed as the income of the trustee, does create grave doubt as to the taxation (and even taxability) of the income from some or all of the following.

- (a) funds held in trust for accumulation,
- (b) funds under all spendthrift trusts,
- (c) funds held in strict trust for the maintenance of various objects, charitable or otherwise,
- (d) all family trusts under wills, as settlements for the "support" of widows, or the "education and support" of children, and
- (e) all estates in process of settlement, including not only estates of deceased persons, but estates administered under assignments for the benefit of creditors, and in bankruptcy, and held by receivers because in none of these cases could it be held that the income had become "immediately available" to the beneficiaries, nor could it be held that there was any "association".

The classification of the Act and Regulations is reasonably clear and is comprehensive. The opinion of the Circuit Court of Appeals leaves the law, all over the country, unfortunately vague and doubtful of application.

The Provisions of the Act.

For the convenience of the Court there are set out in Appendix B hereto (post page 19) certain quoted excerpts (so far as material here) from the Act of October 3, 1913 (38 Stats. 166-172) in which we have emphasized by heavier type the particular words important in this connection.

It is submitted that (whatever be the true classification of incomes made "expressly" taxable) the clear intent of these

provisions of the Act was to require returns from and the payment of income taxes by—

- (a) Individual citizens (Section II, A, Subdivision 1)
- (b) Fiduciaries of all kinds, (Section II, D.) and
- (c) Corporations and *quasi-corporations* (Section II, G (a))

The Treasury Regulations.

For the convenience of the Court certain of these Regulations are set forth in Appendix C hereto (post page 22.)

Reference to these Regulations shows that the Treasury Department considered Trustees taxable as *fiduciaries* even though the income collected by them as Trustees might be wholly *undistributed*.

It is submitted that these are questions of "gravity and importance" akin to and as important as the questions which this Court did review upon certiorari in the cases of—

Doyle, Collector, etc., *v.* Mitchell Brothers Company. and,—

Hays, Collector, *v.* Gauley Mountain Coal Company and other cases of a group decided in May, 1918, and reported in U. S. Supreme Court Advance Opinions No. 14, pages 521 et seq.

If, as the Opinion of the Circuit Court of Appeals would seem to indicate, all persons who may be *associated* in any general colloquial sense are to be, or may be, held quasi-corporate bodies and taxed as such, the consequent doubts and confusion can be clearly seen.

A certified copy of the record in the Circuit Court of Appeals is presented herewith, hereby referred to, and made part of this petition.

It is respectfully submitted that the writ should issue as prayed.

FELIX RACKEMANN,
Attorney for the Plaintiffs.

August 1918.

APPENDIX A.

THE WACHUSETT REALTY TRUST.
DECLARATION.

KNOW ALL MEN BY THESE PRESENTS That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts* according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the *cestui que trusts*

consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the *cestui que trusts*, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may

always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

IN WITNESS WHEREOF we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

ALVAH CROCKER (Seal)

CHARLES T. CROCKER

JOHN J. RIKER

FELIX RACKEMANN

SAMUEL E. M. CROCKER

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,

Before me,

.....
Justice of the Peace.

APPENDIX B.

THE PROVISIONS OF THE ACT.

Section II.

"A. Subdivision 1: That there shall be **levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen** of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided;" *****

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be **levied, assessed and collected, upon the net income of every individual and additional income tax** (herein referred to as **the additional tax**)" *** All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of Paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section. **Every person** subject to this additional tax shall, for the purpose of its assessment and collection, make a **personal return of his total net income from all sources**, corporate or otherwise, for the preceding calendar year, **under rules and regulations to be prescribed by the Commissioner of Internal Revenue** and approved by the Secretary of the Treasury. For the purpose of this additional tax the **taxable income of any individual** shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized." ***

(The second paragraph of B provides for certain deductions allowable in the case of individual returns, including, "seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided.")

"D. ****"On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate **return, under oath** or affirmation, shall be made **by each person** of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of \$3,000 or over **for the taxable year**, to the collector of internal revenue for the district in which such person resides or has his principal place of business," *** "in **such** form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth" etc. ****; **guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals** (Provided, That a return made by one of two or more joint guardians, trustees, executors, etc. **** **under such regulations as the Secretary of the Treasury may prescribe, shall be a sufficient compliance with the requirements of this paragraph; and also all persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies, except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing"** etc. ***

"E. *** All **persons, firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, in whatever capacity acting, including lessees or mortgagors of real or personal property,**

trustees acting in any trust capacity, executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States **having the control, receipt, custody,** disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and **income of another person,** exceeding \$3,000. for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, **are hereby authorized and required to deduct and withhold** from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax."

"G. (a) That the **normal tax hereinbefore imposed upon individuals** likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to **every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships)**" ***

"(c) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first:" ***

APPENDIX C.

THE TREASURY RULES AND REGULATIONS

Article 74 of Regulations No. 33, dated January 5, 1914, provided for the tax to **fiduciaries** "having control of any portion of an annual income accruing during the year," for beneficiaries having a distributive interest, but the income not being distributed or paid over.

T. D. 2231 (superseding original Art. 70 of Regulations No. 33) provided, generally, that guardians, trustees, executors, etc., and all persons acting in any fiduciary capacity, who hold in trust an estate of any other person or persons, shall be designated the "source," "for the purpose of collecting the income tax." It then provided as follows:

"Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of \$3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed \$20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income." and also—

"The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary."

T. D. 2231 was amended by T. D. 2289 to read as follows:

"T. D. 2231 is hereby amended to provide that fiduciaries having control of any portion of income accruing during the year to known beneficiaries other than trust estates, as provided in T. D. 2231, but not distributed or paid to the beneficiaries during the year, shall, in rendering their annual return (Form 1041) give the name and address of each of said beneficiaries having a distributive interest in said income, and shall furnish all the information called for in such returns. In all such cases the fiduciary shall withhold and pay to the Collector, as provided by law, the normal tax of one per cent. upon the distributive interest of each of said beneficiaries, when such interest is in excess of \$3,000, the same as if said income were actually distributed and paid to the beneficiaries," etc., etc.

Note, in the foregoing, that the fiduciary is to "withhold and pay." It was in accordance with such Treasury Decisions and Regulations that all such cases have been uniformly taxed for several years.

APPENDIX D.

Opinion of Hale J. in *Crocker v. Crocker* (not reported.)

"Hale, District Judge. In this case the question is presented whether the defendants, Alvah Crocker and others, trustees under a declaration of trust made by them, and called the Wachusett Realty Trust, are taxable under the Act of October 3, 1913, called the Income Tax, as trustees; or should be taxed as agents of an 'association.' On examination of the case, I have no doubt that the defendants are trustees, and that they are taxable under the Act as fiduciaries. There are no elements of an 'association' in the case before me. The leading English authority on the principles involved in this case is *Smith v. Anderson* 50 L. J. Ch. 39; see also *Williams v. Boston*, 215 Mass. 1; *Foster v. Milton*, 215 Mass. 31; *Hussey v. Arnold*, 185 Mass. 202. There is no basis for any claim of partnership relation existing among the trust beneficiaries; they are not *socii*. The case shows there are no mutual rights or obligations. They carry on no business by themselves, or by any agents or representatives; they have not exercised any voice in the management or control of the trust property, or over the defendants, who act strictly as trustees, and have the entire ownership, management and control precisely as though they had been appointed by will to the same position.

"I have no doubt in coming to the above conclusion on the question submitted to me. I have some question, however, as to the decree which should be entered in the case. Upon this I desire to hear counsel."